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No. 93-1674

In The

Supreme Court of the United States

October Term, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,

Petitioners,

- vs. -

SHARON KARIBIAN and MARK URBAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION OF THE COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES *(cIcu)* FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rules 37.1 and 37.2 of the Rules of this Court, the Commission on Independent Colleges and Universities (*"cIcu"*) respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of Petitioners, The Trustees of Columbia University in The City of New York and John Borden. In support of this motion, ***cIcu*** shows as follows:

1. This motion is necessitated by the refusal of consent of counsel for the Respondent Sharon Karibian to the filing of ***cIcu***'s brief *amicus curiae* in this case. The letters of consent of Petitioners, The Trustees of Columbia University in The City of New York and John Borden, and Respondent Mark Urban, are being filed simultaneously with this motion and brief, pursuant to Rule 37.2 of this Court.

2. ***cIcu*** is a voluntary membership organization, eleemosynary in nature, and represents the presidents of 111 independent colleges and universities in New York State. ***cIcu***'s mission is thus to speak as the collective voice of its member colleges and universities in matters involving public policy affecting higher education, carrying forth those public policies its member presidents have determined affect the individual and the collective missions of these independent college and university campuses.

3. All of ***cIcu***'s member colleges and universities will be affected by the decision reached by the Court of Appeals for the Second Circuit in *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), in responding to incidents of sexual harassment pursuant to: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*; Title IX of the Higher Education Act of 1972, as amended, 20 U.S.C. §§ 1681, *et seq.*; and the guidelines of the Equal Employment Opportunity Commission ("EEOC"), *Equal Employment Opportunity Commission Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (March 19, 1990).

4. The instant case presents a decision by the Court of Appeals for the Second Circuit which is contrary to this Court's holding in *Meritor Sav. Bank FSB v. Vinson*, 447 U.S. 57 (1986), and which is in conflict with all other Circuits which have spoken on the issue. *See Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989).

5. ***cIcu***'s members have a fundamental interest in this case inasmuch as colleges and universities are concerned with their responsibilities under Titles VII and IX and the guidelines of the EEOC. Their policies and procedures with regard to sexual harassment are designed to prevent and promptly remedy alleged harassment.

6. The Second Circuit's decision will undermine, through the imposition of a standard of strict liability for employers, the proactive, curative effect of specific procedures and policies developed and implemented by colleges and universities in New York State, as well as those within the greater purview of the Second Circuit, for dealing with sexual harassment. Without an examination of the relevant facts and circumstances surrounding these cases, this Court's reasoned holding in *Meritor* for resolving the complex issues inherent in sexual

harassment cases will be undermined, as will the import of Title VII, Title IX and the guidelines of the EEOC.

7. As the Court of Appeals for the Fifth Circuit has most recently determined, to hold an employer strictly liable for the acts of its supervisory employees after said employer has utilized prompt and effective procedures and policies to stop the harassment, "would produce truly perverse incentives benefiting no one, least of all the actual or potential victims of sexual harassment." *Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956, at *13.

8. The Second Circuit stands alone among the Circuits in contrast to this Court's holding in *Meritor*, and its decision is a radical departure from well-established principles for dealing with sexual harassment which this Court has directed be applied in such cases. *Meritor*, 477 U.S. at 72.

9. Moreover, the decision of the Second Circuit would affect the rights and responsibilities of colleges and universities under New York's Labor Law § 201-d (McKinney 1994), and would also unnecessarily intrude on the traditional rights of freedom of speech, as guaranteed by the Constitution, in the academic setting. This "free marketplace of ideas" has made America's colleges and universities the envy of the free world, and must not be abridged.

WHEREFORE, ***cIcu*** respectfully requests it be granted leave to file the accompanying brief

amicus curiae in support of the Petitioners, The Trustees of Columbia University in The City of New York and John Borden.

Dated: Albany, New York
May 20, 1994

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

CONCLUSION 12

APPENDIX A1

TABLE OF AUTHORITIES

Pages

CASES

Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984) 5

Carmon v. Lubrizol Corp., No. 92-2964, 1994 U.S. App. LEXIS 5956 (5th Cir. 1994) 5, 6

Davis v. Monsanto Chem. Co., 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) 5

Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307 (5th Cir. 1987) 5

Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) 8

Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572 (10th Cir. 1990) 5

Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) 5

Karibian v. Columbia University, 812 F. Supp. 413 (S.D.N.Y. 1993); 14 F.3d 773 (2d Cir. 1994) ..2, 3, 6, 9

Kotcher v. Rosa and Sullivan Appliance Center, Inc., 957 F.2d 59 (2d Cir. 1992) 9, 10

Meritor Sav. Bank FSB v. Vinson, 477 U.S. 57 (1986). . *passim*

Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554 (11th Cir. 1987) 5, 6, 10

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311 (11th Cir. 1989) 5

Swentek v. USAir, Inc., 830 F.2d 552 (4th Cir. 1987) 5

TABLE OF AUTHORITIES – Continued

Pages

STATUTES AND RULES

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq*. 4, 8, 10, 12

Title IX of the Higher Education Act of 1972, as amended, 20 U.S.C. §§ 1681, *et seq*. 4, 8, 10, 12

N.Y. Labor Law § 201-d (McKinney 1994) 4, 11

MISCELLANEOUS AUTHORITIES

Petition of The Trustees of Columbia University in The City of New York and John Borden for a Writ of Certiorari, Karibian v. Columbia University (No. 93-1674) 3, 7, 10, 11

Brief for United States and EEOC as Amici Curiae in Meritor Sav. Bank FSB v. Vinson 7

Equal Employment Opportunity Commission Policy Guidance on Current Sexual Harassment Issues, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (Mar. 19, 1990) 4, 7, 9, 10, 12

Restatement (Second) of Agency §§ 219-237 (1958) 6

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SHARON KARIBIAN and MARK URBAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF THE COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES *(cIcu)* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Commission on Independent Colleges and Universities (*"cIcu"*) represents 111 independent colleges and universities in New York State. As *amicus curiae*, ***cIcu*** submits this brief in support of the Petition of The Trustees of Columbia University in The City of New York ("Columbia University") and John Borden for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to review the decision and judgment

dated January 25, 1994 in *Karibian v. Columbia University, et al.*, No. 93-7188.

INTEREST OF THE *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

The Commission on Independent Colleges and Universities (***cIcu***) is a voluntary consortium of 111 nonprofit, degree-granting, independent institutions of higher learning in New York State. It is the coordinating body and public policy forum for these institutions. Chartered by the New York State Board of Regents, ***cIcu*** is a private eleemosynary educational corporation. It provides the independent-sector framework for the presidents of New York's independent colleges and universities to determine those public policies they believe will best advance the individual and collective missions of these campuses. Located in Albany, New York, ***cIcu***'s mission, together with its affiliate, the New York State Coalition for Independent Colleges and Universities, is to articulate these policies, in appropriate fora, to best advance the collective interests of these member institutions and to maintain their independence. (A listing of the members of ***cIcu*** is attached herein as an Appendix.)

The Second Circuit Court's decision in the case of *Karibian v. Columbia University*, 14 F.3d 773 (2d Cir. 1994), has articulated a new standard of strict liability against employers for acts of sexual harassment committed by supervisors, regardless of whether the employer had

actual or constructive notice of the conduct of the supervisor, and regardless of whether the employer had effective procedures and policies in place to investigate and resolve such claims. This ruling is contrary to the pronouncement of this Court in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986). The Second Circuit's decision also determined that prompt and effective action by the employer to stop the harassment and to discipline the harasser will not operate to relieve the employer of strict liability for the acts of the employee. *Karibian, Id.* Without reinforcement of the *Meritor* decision, all employers within the purview of the Second Circuit will be subject to this untenable standard of strict liability and will have no incentive to enact or follow through with effective policies and procedures to deter sexual harassment and to resolve sexual harassment complaints when they arise.

The instant case is solid in that all necessary and prudent steps were taken by the University upon its having knowledge of the situation upon which it could act. As the District Court noted, once Columbia University had notice, it acted with dispatch. *See Karibian v. Columbia University*, 812 F. Supp. 413, 417 n.6 (S.D.N.Y. 1993); *See also* Columbia University's *Petition for a Writ of Certiorari, Karibian v. Columbia University* (No. 93-1674) ("Petition of Columbia University") at 4, 5.

The Second Circuit's holding in this case, specifically, that a standard of strict liability shall be applied to employers for acts of sexual harassment by their supervisory employees, without an examination of the relevant facts and circumstances surrounding the case, is of great concern to the independent colleges and universities in New York State, for it has the power to significantly

undermine– and perhaps destroy– the sound and rational pronouncement of this Court in *Meritor* and further, to intrude on the efforts and advancements made by these institutions in developing, implementing and enforcing effective policies and procedures on sexual harassment pursuant to the guidelines developed in *Meritor*, the requirements of Title VII, Title IX and the EEOC. 477 U.S. 57 (1986); 42 U.S.C. §§ 2000e, *et seq.*; 20 U.S.C. § 1681; *Equal Employment Opportunity Commission Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (March 19, 1990).

The Second Circuit's holding could also force employers to intrude into private social relationships among employees. *Cf.* N.Y. Labor Law § 201-d (McKinney 1994). Further, application of the Second Circuit's standard of strict liability could abridge traditional academic freedoms and rights of free speech which are vital to the college and university marketplace of ideas and protected under the Constitution.

ARGUMENT

Inasmuch as the Second Circuit's decision is contrary to this Court's prior directives, and will significantly undermine the role of sexual harassment policies and procedures at colleges and universities, we urge this Court to grant the Petition of Columbia University and hear this case, for it has far reaching impact on all employers.

In view of the Second Circuit's departure in this case from this Court's decision in *Meritor* and its progeny in

the various other Circuits (*See* cases cited in Petition of Columbia University at 10, 11: *Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987); *Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987); *Davis v. Monsanto Chem. Co.*, 858 F.2d 345 (6th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989); *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317 (7th Cir. 1992); *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424 (8th Cir. 1984); *Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572 (10th Cir. 1990); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *see also Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956 (5th Cir. 1994); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987)), this Court must review the decision of the Second Circuit and restore a case-by-case analysis which takes into account effective procedures and policies utilized by employers to preserve, restore and protect harassment-free work environments.

The sexual harassment case is far too complex (and far too important and dispositive are the actions the employer has taken in this case to protect all parties involved– be they alleged victim or alleged harasser) to allow the detrimental outcome reached below in this case to stand. We must strenuously urge, therefore, that the analysis provided for in *Meritor* be maintained to assure careful, case-by-case determination of the adequacy of procedures in place to protect all parties and to foster a work environment free from sexual harassment. Where effective policies and procedures are in place, it would benefit no one to ignore the important role of these procedures and policies in sexual harassment cases. Moreover, as the Fifth Circuit has most recently held in

the *Carmon* case, to deem the employer liable after prompt corrective action "would produce truly perverse incentives benefiting no one, least of all the actual or potential victims of sexual harassment." *Carmon v. Lubrizol Corp.*, No. 92-2964, 1994 U.S. App. LEXIS 5956, at *13.

This Court concluded similarly in *Meritor* that the Court of Appeals for the District of Columbia Circuit "erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Meritor*, 477 U.S. at 72; *see generally* Restatement (Second) of Agency §§ 219-237 (1958). The Court of Appeals for the Second Circuit has plainly erred in precisely the same manner in the instant case, disregarding the existence of full and adequate procedures to dispel any apparent authority of the supervisor and further, by disregarding the utilization of the procedures and policies in place for the remediation of the proscribed conduct. *Karibian*, 14 F.3d at 780. In contrast, the Eleventh Circuit, in the *Sparks* case, involving both *quid pro quo* and hostile environment claims, noted an employer may divest the harasser-supervisor of actual or apparent authority by developing and utilizing policies and procedures which operate to prevent and correct acts of sexual harassment. *Sparks*, 830 F.2d at 1560. However, the Second Circuit, in the instant case, ignored completely the important role of effective policies and procedures.

Here, the policies and the procedures employed by Columbia University are such that they are consistent with the guidance offered by the EEOC regarding its recommendation for the appropriate application of

agency principles as enunciated in the *Meritor* Opinion of this Court:

> [where there is] a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, [when] that procedure was reasonably responsive to the employee's complaint . . . the employer should be shielded from liability. . . .

Brief for United States and EEOC as *Amici Curiae* in *Meritor*, at 26.

Conversely, the EEOC also said:

> [The] employer will be liable if the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Id.

In the instant case, Columbia University had appropriate procedures and policies in place for reporting such incidents and such avenues were utilized by the Respondent. Further, when the Respondent voiced her complaint to Columbia University, she was separated from the alleged harasser. Investigation and effective remedial action promptly followed. *See* Petition of Columbia University at 4, 5. These actions are consistent with EEOC Guidelines and the Opinion of this Court in *Meritor*. The *Meritor* decision held "that the Court of Appeals [for the District of Columbia Circuit] was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, *regardless of*

the circumstances of a particular case." 477 U.S. at 73 (emphasis added).

Today's emerging standards of equality and individual autonomy demand nothing less than a framework for dealing with sexual harassment which allows for and, in fact, encourages, as warranted: the employer to take action to protect; the employee to take action to speak out; and the supervisor employee to take action to act appropriately– in a manner consistent with the goals of our society– freedom, equality and personal autonomy. Indeed, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, is designed to create and to protect "workplace equality." *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993).

Title VII requires employers to take steps to prevent and remediate in cases of sexual harassment. Higher education institutions are additionally bound under Title IX of the Higher Education Amendments of 1972. 20 U.S.C. §§ 1681, *et seq.* These statutory protections, and the guidance afforded by this Court in *Meritor* regarding agency principles and the role of policies and procedures, are at the heart of this case. Title VII does not operate, nor should it, to impose strict liability on employers, regardless of the circumstances of a particular case. *Meritor*, 477 U.S. at 73. Cases involving this most sensitive subject must be permitted a case-by-case determination and no broad, sweeping rule may ensure equality of treatment for all, least of all the victims of such improper acts.

In a case such as this, where Columbia University had in place multi-leveled policies and avenues for

response, it would not only be bizarre to impose a standard of strict liability, but would, as a practical matter, operate to undermine alleged victims by chilling their opportunity and duty to come forward in a safe and open environment to stop such abuse. The EEOC has stressed that an important part of any "effective preventive program" should be the inclusion of a procedure designed to "encourage victims of harassment to come forward." *Equal Employment Opportunity Commission Policy Guidance on Current Sexual Harassment Issues*, 8 Fair Empl. Prac. Manual (BNA) 405:6681 (March 19, 1990).

The Second Circuit's decision imposing strict liability on employers would operate to the detriment of victims by removing the incentive to employers to act diligently and intelligently in their behalf. Faced with *strict* liability with regard to alleged victims on the one hand, and *potential* liability with regard to wrongful or constructive discharge of alleged harassers on the other, employers would be placed in an untenable position *vis a vis* the relevant statutory schemes and the practicalities of employer responsibility.

Prior to the instant case, the Second Circuit followed the *Meritor* analysis in *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992). In that supervisor-harasser case, the Second Circuit followed agency principles and noted a plaintiff must demonstrate some specific basis to hold an employer liable for misconduct of its supervisory employees under a hostile environment theory. *Id.* at 62; *Karibian*, 14 F.3d at 779. Columbia University provided several reasonable avenues through its established procedures and policies, and did something about it. Under all court-established and

statutory guidelines, there is no specific basis whatever upon which to hold the University liable in this case. *See* Petition of Columbia University at 4, 5. Nonetheless, the Second Circuit cast aside agency principles and held contrary to its recent holding in *Kotcher*. Doing this required, as well, an abandonment of this Court's holding in *Meritor*, and is inconsistent with Title VII, Title IX and the guidelines of EEOC. Claims of sexual harassment are too complex to be subject to any absolute standard. Effective sexual harassment policies and procedures such as Columbia University's, which operate as a protective and proactive mechanism, are far too important to be cast aside in an irrelevant manner.

The Second Circuit has simply gone too far, in light of the existence of, nay, the requirement for, effective procedures and policies and their utilization under Title VII, and Title IX and the guidelines of EEOC. Such mechanisms are critical to empowering an alleged victim to obtain protective and remedial action. Where, as here, such policies and procedures are effective, they can clearly operate to divest the harasser-employee from such perceived authority, as in the instant case, and thereby empower the victim to reject the alleged harassment. *Meritor*, 477 U.S. at 72; *see also Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

Accordingly, we respectfully request this Court to grant the Petition of Columbia University in order to safeguard the important role of procedures and policies in effectuating the purposes of Title VII and Title IX. A case-by-case analysis is paramount to this end and consistent with the principles of agency analysis as set forth by this Court in *Meritor*. Unless this Court grants the

Petition of Columbia University, the effective mechanisms for dealing with sexual harassment developed and implemented by colleges and universities will be greatly undermined to the detriment of the very people the statutes and procedures are intended to protect.

Another problem with the Second Circuit's decision in this case presents itself when the holding is juxtaposed with New York's statutory pronouncement on employers intruding improperly into the area of private social relationships among employees. *Cf.* N.Y. Labor Law § 201-d (McKinney 1994). Faced with a standard of strict liability with regard to sexual harassment, employers might look to anti-fraternization policies, placing themselves in the untenable position of risking such intrusion and potentially inviting litigation based on violation of New York's Labor Law. *See* Petition of Columbia University at 15 n.9.

Further, the imposition of strict liability on employers for acts of sexual harassment by their employees could ensnare colleges and universities by restricting their traditional role in fostering a free marketplace of ideas for which American academia is the envy of the world. Nothing but a case-by-case analysis of procedures, policies and actions taken in cases of alleged sexual harassment can ensure against violations of free speech. Application of the Second Circuit's standard to even a portion of America's colleges and universities could operate to enforce and uphold the very restrictions on free speech in academia that have heretofore been rejected as violative of the Constitution and traditional academic principles. The principles of academic freedom and free speech must not be eviscerated by a hard and fast rule of strict liability as applied to sexual harassment.

Hence, application of the fair and rational principles enunciated in *Meritor* would accomplish the articulated goal of identifying and rejecting unacceptable, improper and unlawful conduct without intruding into the protections afforded all parties in cases of sexual harassment. Concomitantly, the protections now afforded privacy and free speech, which would be unavoidably mutated under the Second Circuit's rule, would be preserved.

CONCLUSION

Accordingly, sound public policy dictates that where, as here, the employer has: 1) investigated the harassment claim; 2) taken appropriate remedial steps, as warranted; 3) has effective grievance procedures and anti-discrimination policies in place; and 4) has effectively stopped the alleged harassment pursuant to those policies and procedures; these factors must be considered in determining whether the employer is liable, consistent with the import of Title VII, and Title IX, EEOC guidelines and the *Meritor* analysis. Were it not so, the rights and duties of all parties to these incidents would be indelibly diminished, undermined and abridged.

Therefore, consistent with its decision in *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986), we respectfully urge this Court to grant the Petition of The Trustees of

Columbia University in The City of New York and John Borden and issue a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Dated: Albany, New York
May 20, 1994

Respectfully submitted,

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APPENDIX

Members of the Commission on Independent Colleges and Universities

Adelphi University
Albany College of Pharmacy
Albany Law School
Albany Medical College
Alfred University
American Academy of Dramatic Arts
American Academy McAllister Institute
Audrey Cohen College
Bank Street College of Education
Bard College
Barnard College
Boricua College
Bramson ORT Technical Institute
Canisius College
Catholic Medical Center School of Nursing
Cazenovia College
Clarkson University
Cochran School of Nursing
Colgate University
College of Aeronautics
College of Insurance
College of Mount Saint Vincent
College of New Rochelle
The College of Saint Rose
Columbia University
Concordia College
Cooper Union
Cornell University
Culinary Institute of America
D'Youville College
Daemen College
Dominican College of Blauvelt
Dowling College
Elmira College
Fordham University
Hamilton College
Hartwick College
Helene Fuld School of Nursing
Hilbert College
Hobart & William Smith Colleges
Hofstra University
Houghton College
Institute of Design and Construction
Interfaith Medical Center School of Nursing
Iona College
Ithaca College
Jewish Theological Seminary of America
Keuka College
The King's College
Le Moyne College
Long Island College Hospital School of Nursing
Long Island University
Manhattan College
Manhattan School of Music
Manhattanville College

Maria College of Albany
Marist College
Marymount College
Marymount Manhattan College
Mater Dei College
Medaille College
Mercy College
Molloy College
Mount Saint Mary College
Nazareth College
New School for Social Research
New York Chiropractic College
New York College of Podiatric Medicine
New York Institute of Technology
New York Medical College
New York School of Interior Design
New York University
Niagara University
Nyack College
Pace University
Paul Smith's College
Phillips Beth Israel School of Nursing
Polytechnic University
Pratt Institute
Rensselaer Polytechnic Institute
Roberts Wesleyan College
Rochester Institute of Technology
Rockefeller University
The Sage Colleges
St. Bonaventure University
St. Elizabeth Hospital School of Nursing
St. Francis College
St. John Fisher College
St. John's University
St. Joseph's College
St. Joseph's Health Center School of Nursing
St. Lawrence University
St. Thomas Aquinas College
Sarah Lawrence College
Siena College
Sisters Hospital School of Nursing
Skidmore College
Syracuse University
Teachers College of Columbia University
Touro College
Trocaire College
Union College
University of Rochester
Utica College of Syracuse University
Vassar College
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Wagner College
Webb Institute of Naval Architecture
Wells College
Yeshiva University